

October 20, 1994

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Video Dialtone (CC Docket No. 87-266)*

Today we continue our development of policies pertaining to the much-discussed "convergence" of communications businesses. This item presents the first opportunity for three of the Commission's five members to review in a comprehensive manner the video dialtone rules promulgated in 1992. For all five of us, this reconsideration proceeding allows us to reflect upon technology, marketplace, and policy developments occurring since the original decision and to recast and refine video dialtone policies in light of current circumstances.

Video dialtone has the potential to be a highly successful construct. The fundamental concept is sound: a basic video delivery platform, provided on a common carrier (non-discriminatory) basis, serving multiple programmer-customers, and expanding as demand increases. This approach creates a significant new role for local exchange carriers in the delivery of video programming.

The three principal goals of video dialtone, as articulated in the 1992 order, remain valid. First, we are resolved to promote competition in the delivery of video programming, primarily because competition leads to lower prices, better services, and the like, but with the added benefit that competition will enable us to eliminate regulation of cable rates. Second, we want to stimulate investment in advanced telecommunications infrastructure. Third, we also expect, over the longer term, to expand consumer choice in programming and to encourage the development of innovative new services. Video dialtone can play a crucial role in all these areas.

Yet we must also acknowledge that there are dangers. A variety of competitive and consumer concerns have been raised, and we have done our best to answer them with the necessary safeguards.

In the remaining years of this decade, video dialtone and related offerings will likely stimulate tens if not hundreds of billions of dollars of local exchange carrier investment in network upgrades. Proper allocation of these costs is essential to protect consumers who do not choose to use telco-provided video services. Unfair leveraging of market power must be avoided; we seek not simply competition but competition which is fair and which has the best possible chance of being sustainable over the long run.

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This order reflects a careful, and I believe appropriate, balancing of interests. The basic framework adopted in the prior order has been affirmed, but today's decision is tailored to fit our current assessment of relevant considerations.

We have modified our earlier jurisdictional determination in a manner which is more accommodating of the legitimate interests of the states. We have tightened the explanation of the "new services test" and thereby reduced the risk that costs of network upgrades will be allocated disproportionately to nonvideo services. We have added discussions of the Section 214 and tariff review processes so that all parties will understand the measures we are relying upon to ensure compliance with our rules and policies. We have pledged careful scrutiny of cost allocation manuals, initiation of a notice of inquiry on jurisdictional separations issues, and consideration of a separate price cap basket for video dialtone services. We have also noted the states' freedom to apply their own standards in deciding which costs to allow in establishing intrastate rates, even if they have flowed through our separations process.

In these and other respects, we have tried to be responsive to legitimate concerns. But we remain determined to see video dialtone succeed. We have rejected proposals which would have delayed video dialtone for prolonged periods or saddled it with burdens that would have doomed it from the start. We have adopted an approach that I believe is fair, responsible, practical, and prudent.

We have also identified several important issues that warrant further review. I have a particular interest in the issue of consumer privacy and strongly support the decision to ascertain what subscriber information will be available to video dialtone platform providers, so that we can then determine whether additional privacy safeguards are needed. I will also be interested to review additional information regarding channel sharing plans, such as the "will-carry" proposal and the proposal that public broadcasters receive preferential rates for access to the video dialtone platform.

Other issues that have arisen during the course of our deliberations on video dialtone will be addressed in other proceedings. In this regard, I appreciate the assurance that "redlining" issues will be carefully and promptly considered, once the Bureau has had an opportunity to review the record compiled in response to a petition for rulemaking filed by five consumer and civil rights organizations.

In deliberations such as have occurred on video dialtone, it is inevitable that one or another of us would have preferences or concerns not shared by the majority. This is not the result of fractiousness but of five independent Commissioners applying their own skills and perspectives to the issues at hand. The matter of non-equity relationships is one that I would have preferred to handle differently; our decision to permit a wide range of relationships between the carriers and their customer-

programmers increases incentives for discriminatory behavior and places more of a burden on our monitoring responsibility and on our complaint process. This concern is somewhat attenuated by our decision, with which I fully concur, to reject proposals for "anchor-programmers," which would represent a significant departure from the basic precepts of the video dialtone model. The prospect of discrimination is also somewhat alleviated by the Bureau's commitment to enforce common carrier obligations rigorously.

We are not giving anyone carte blanche. Our action today reflects a continuing commitment to promote and protect the interests of the American consumer.

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For a time, it had appeared that Congress might this year enact legislation updating the Communications Act of 1934, in recognition of the new circumstances presented by construction of the Information Superhighway. When the legislative drive faltered, we needed to decide how best to proceed under existing statutes. Today's action shows that the Commission is steadfastly determined to move ahead - to promote video competition and to spur investment by telephone companies -- even as we hope that Congress returns to these issues early in the new year. At the same time, we signal our strong support for local exchange competition.

I am optimistic about the benefits that will flow from video dialtone. As I wrote when we approved the first Section 214 application for a commercial video dialtone service, in Dover Township, New Jersey:

A new day is dawning. No longer will telephone companies simply provide telephone services and cable companies merely provide video programming services. Video dialtone, together with direct broadcast satellite and wireless cable, can -- over time -- provide consumers with a range of choices. As in other areas where the Commission has promoted the introduction of competition, competition in video delivery services will foster lower prices, stimulate new services, and encourage the development and deployment of new technologies.

Progress in these areas will inevitably be incremental. There is a danger that expectations will exceed results. Nonetheless, I have high expectations of video dialtone.

Our work in this important area is not by any means finished. We have further stages to complete in this rulemaking and other important undertakings in companion dockets. Section 214 applications and tariff processing will test our resources and our resolve.

I am confident that the video dialtone regime can be successful. Today's decision is at once both a measured step and a long stride in the right direction.

October 20, 1994

SEPARATE STATEMENT
OF
COMMISSIONER RACHELLE B. CHONG

Re: Video Dialtone Reconsideration (CC Docket No. 87-266)

By this action, the Commission takes a significant step to promote competition in the delivery of video services to consumers. Our video dialtone rules, as modified on reconsideration, provide a regulatory framework that permits telephone companies to compete as common carriers in the market for multichannel video services. Up to now, in the vast majority of localities in the country, that market has consisted of a single multichannel video programming service provider. As telephone companies implement video dialtone systems, however, consumers will be able to choose among competing multichannel video programming service providers. Because video dialtone comports with my fundamental belief that competitive markets -- rather than heavily regulated, monopolistic ones -- best serve the public interest, I am pleased to support the Commission's decision on reconsideration.

The Continued Need for Video Dialtone

In recent years, regulators and legislators have grappled with issues related to the lack of competition in the video market. One of the overarching goals of the Commission's August 1992 video dialtone decision was to "increas[e] competition in the video marketplace" consistent with existing law.¹ Shortly thereafter, Congress enacted legislation to address this problem as well. Like the Commission's video dialtone policy, the Cable Act of 1992 rests on a determination that cable television operators often face no local competition from alternative multichannel video programming distributors. Congress explicitly found that the dearth of competing multichannel video providers resulted in "undue market power for the cable operator as compared to that of consumers and video programmers."²

Just last month, the Commission issued its first report to Congress on video competition as mandated by the Cable Act of 1992. We stated that "[t]he market for the distribution of multichannel video programming remains heavily concentrated at the local level, and for most households, cable television is the only provider of multichannel video

¹ Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 7 FCC Rcd 5781, para. 1 (1992).

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460 (1992).

programming."³ We concluded that "[c]able systems continue to have substantial market power at the local distribution level."⁴ Moreover, in 1994, Congress considered, but did not enact, sweeping telecommunications legislation that would have facilitated telephone company participation in video programming services. These legislative and regulatory responses reveal both Congress' and the Commission's serious concern about the level of competition in the video services market.

Presently, due to the lack of competition in the multichannel video services market, rates for cable services are regulated in most areas of the country. The rate regulation provisions of the Cable Act of 1992 seek to ensure that consumer interests are protected "where cable systems are not subject to effective competition."⁵ When a cable system does face "effective competition," as defined by the statute, its rates are exempt from regulation.⁶

Because rate regulation under the Cable Act of 1992 depends on whether "effective competitive" exists in a particular locality, an opportunity exists to facilitate competition and thus obviate the need for cable rate regulation. Regulation of cable television rates, in my estimation, is a complex, burdensome and resource-intensive proposition for cable operators, local franchising authorities and the Commission. I can think of few more important public interest objectives than to pursue regulatory policies, such as video dialtone, that introduce effective competition in the multichannel video services market. By expeditiously promoting such competition, we may diminish and eventually eliminate the need for cable rate regulation.

Against this backdrop, we reconsider the video dialtone rules the Commission promulgated in 1992. As this discussion makes clear, however, video dialtone remains just as relevant in today's world as it did two years ago.

Video Dialtone -- The Big Picture

Video dialtone heralds the convergence of video and telephony. In approaching this important decision, I have tried to place video dialtone within the broader context of our regulation of telecommunications generally. We are experiencing rapid change in technology, competition, markets and industries. We must therefore constantly reassess existing regulations to ensure that they make sense in today's world.

³ First Report, CS Docket No. 94-48, FCC 94-235 at 5 (released Sept. 28, 1994).

⁴ Id.

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(4), 106 Stat. 1463 (1992).

⁶ 47 U.S.C. § 543(a)(2).

In this regard, video dialtone presents important implications for how we regulate multiple markets and converging industries. I believe it is in the public interest to view our regulation of the cable industry through the prism of the state of competition in the multichannel video services market. As competition increases in that market -- as a result of video dialtone or otherwise -- I believe it may be appropriate to afford cable operators more flexibility to respond positively to that increased competition. Cable operators, like telephone companies, should play an important role in building advanced telecommunications facilities and bringing innovative services to consumers. Our existing regulations should be reassessed and any new rules designed to encourage this participation by the cable industry.

Likewise, the advent of video dialtone and other broadband services presents implications for our existing telephone industry regulation. We currently are reviewing the performance of our price cap rules for local exchange carriers.⁷ As part of that review, we are reexamining the validity of the current productivity offset factor and the earnings sharing mechanism embodied in the Part 61 rules. The emergence of telephone company participation in the video services market may be relevant to our review of these and other aspects of the price cap regime.

Further, I believe we should critically assess our existing jurisdictional separations rules as we move toward broadband, integrated facilities capable of transmitting voice, video and data. We need to ensure that our separations rules adequately address the evolving nature of common carrier networks. In this regard, I am pleased that we are announcing our intention to initiate a broad inquiry to examine separations issues. We will need to draw on the ideas and experience of state regulators in this inquiry. This dialogue may lead to concrete proposals to amend our Part 36 rules to reflect current and future conditions.

Finally, the telephone industry has for some time advocated a comprehensive review of our access charge rules. As video dialtone and other broadband services emerge, we will need to reexamine our Part 69 rules to see what changes may be appropriate in a rapidly changing environment.

Guiding Principles

I would like briefly to touch on several other principles that guided my decision in this proceeding. First, I believe that construction of broadband, integrated telecommunications facilities will bring significant benefits not only to consumers of video services, but also to consumers of voice and data services. Video dialtone is one piece of the regulatory puzzle that will facilitate the development of an advanced national information infrastructure. Such a sophisticated network of information and communications networks will bind us together as a people and enrich our everyday lives. Futurists are just beginning to realize the potential of

⁷ See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

the NII to improve education, health care, government services and economic development for all areas of our country. The Information Age is about to deliver some dazzling new services and products to us all.

This view ultimately led me to conclude that regulating video dialtone pursuant to our existing accounting, cost allocation, jurisdictional separations, access charge and price cap rules is a reasonable approach. To the extent that experience with video dialtone implementation or other broadband services reveals systemic problems or unanticipated results, we can and should revisit our rules and make needed changes.

Second, I believe we can implement video dialtone and encourage infrastructure development without asking telephone ratepayers to shoulder an unacceptable burden. There is a concern expressed by some parties that telephone companies will price video dialtone service as low as possible in order to maximize market share in video services, while at the same time assigning significant costs of network upgrades to telephony services. As to telephone companies pricing video dialtone services to capture market share, there is nothing inherently nefarious in such a strategy. In America's free market economy, businesses daily make market entry pricing decisions like this as a matter of normal business strategy. Nevertheless, legitimate concerns exist regarding the potential anticompetitive results of such pricing and fairness issues related to infrastructure costs. It is incumbent upon the Commission to guard against anticompetitive pricing and to ensure an equitable allocation of costs among rates charged for various services offered over integrated facilities. I am mindful of these concerns.

Ultimately, I was persuaded that it was not possible to promulgate rules dictating precise allocations of common costs and overheads associated with network upgrades to video dialtone services. As the pending Section 214 applications of the telephone companies amply demonstrate, telephone companies have proposed markedly different architectures for video dialtone systems that present unique cost allocation issues. Indeed, as it should, the Commission has encouraged innovation and diversity in video dialtone systems. A one-size-fits-all approach to cost allocation would not adequately address these varying situations, and would result in unnecessary delay in introducing competition to the video services market.

Instead, I believe that the Section 214 process and the tariff review process provide a flexible framework to accommodate the important and varying issues presented by diverse video dialtone proposals. With respect to the tariff review process, we are clarifying the application of the price caps "new services" test in the context of video dialtone. This is designed to address the concern that rates for video dialtone may be unreasonably low. We are providing some advance guidance in this decision as to what we will consider a reasonable allocation of common costs and overheads to video dialtone rates. The Commission will examine with care tariff filings by telephone companies proposing to offer video dialtone, and I will not hesitate to join my colleagues in exercising the Commission's powers under Title II to address unreasonably low rates. Careful scrutiny of video dialtone tariff filings, coupled with our existing price cap rules, should provide an equitable framework for video dialtone.

Moreover, we direct the Common Carrier Bureau to collect data regarding the implementation of video dialtone and the results obtained under our existing rules. This monitoring program should help us detect any problems or unanticipated results and respond accordingly.

Finally, I am firmly committed to the common carrier model for telephone company provision of video dialtone service. I look forward to a day when any entity can enter any sector of the communications market and compete according to the same ground rules. At the present time, however, we have different statutory schemes for telephone companies and cable operators. So long as a telephone company offering video dialtone service does not provide video programming directly to subscribers in its telephone service area, it is not subject to Title VI requirements governing cable communications.⁸ Under our rules and consistent with traditional Title II requirements governing common carriage, video dialtone providers must provide sufficient capacity on the basic platform to serve multiple video programmers on a nondiscriminatory basis. Moreover, they must expand capacity, when technically feasible and economically reasonable, to meet increases in demand. These bedrock common carrier principles are at the heart of video dialtone and distinguish video dialtone from traditional cable television service. As one court recently noted, common carriage is what makes video dialtone and cable "very different creatures."⁹

Telephone companies have urged us to approve various proposals designed to address a perceived shortage of analog channel capacity, at least during the initial stages of video dialtone. In this decision, we reject a proposal to permit one video service provider to use a large majority of available analog channels on the video dialtone platform. I support this portion of the decision because I believe that the so-called "anchor tenant" proposal is inconsistent with the notion of common carriage. Other so-called "channel sharing" proposals have been advanced by telephone companies to address the issue of limited analog channel capacity. I support the decision to seek further comment on these proposals, many of which were brought to the attention of the Commission through recent Section 214 applications and ex parte filings in this docket. I am hopeful that these further comments will augment the record and allow us to examine more fully the extent of the problem and consider creative solutions. While I remain open to these various proposals, I will examine the record to determine whether they can be implemented consistent with common carrier principles and other applicable law.

⁸ See National Cable Television Ass'n. v. FCC, No. 91-1649 (D.C. Cir. Aug. 26, 1994) (telephone company providing video dialtone service need not obtain a cable franchise under Title VI).

⁹ Id., slip op. at 18.